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No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STANTON D. ERNEST,

Petitioner

versus

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does a lawyer who in good faith causes a subpoena to issue to the trial judge for a discovery deposition because he believes the judge may have information necessary to protect his clients' interests create the imminent threat to the administration of justice required by the due process clause for conviction of criminal contempt?

(2) Is the due process requirement that a criminal defendant be convicted only on evidence that convinces the trier of fact of every element of the crime beyond a reasonable doubt satisfied by a criminal contempt trial at which no prosecutor appears and no evidence is offered against defendant?

(3) Is the defendant's right to confrontation violated by a trial at which all evidence for the prosecution is received through judicial notice even though the witness was available and the prosecution made no effort to present that witness against defendant?

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at ___ Ill.2d ___.

___ N.E.2d ___ (1990), and is reproduced at Appendix A-1 to A-41. The opinion of the Appellate Court of Illinois is reported at 188 Ill. App. 3d 987, 544 N.E.2d 1275 (1989), and is reproduced at Appendix A-42 to A-59. The opinion of the Circuit Court of the Second Judicial District, Wabash County, Illinois, denying a new trial, is not reported, and is reproduced at Appendix A-60 to A-75. The first opinion of the Circuit Court of the Second Judicial District, Wabash County, Illinois, finding petitioner guilty of criminal contempt, is not reported, and is reproduced at Appendix A-76 to A-92.

JURISDICTIONAL GROUNDS

The decision of the Supreme Court of Illinois was filed and entered on

December 20, 1990. This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1257(a) because a "right, privilege, or immunity is specially set up or claimed under the Constitution. . .."

APPLICABLE CONSTITUTIONAL PROVISIONS

1. United States Constitution, Amendment Fourteen, Section 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. United States Constitution, Amendment Six:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Facts

This criminal contempt conviction grew out of petitioner Stanton Ernest's efforts to represent the interests of six charities in a probate matter. Brief mention of some facts of the probate is necessary to understanding.

The will in question provided for cash bequests exceeding $330,000 to individuals, churches, and universities. The executor, who had recently transferred many of the testator's assets into joint tenancy with himself, determined only $97,000 remained for distribution. He consequently proposed that the money available be used to satisfy the bequests in the order made in full (including his own) until the money ran out; later bequests in the

will (including the charities) would receive nothing. Notice of a hearing to approve the plan and close the estate was given only to those persons who would receive money. At the October 8, 1986, ex parte hearing, Judge Robert M. Keenan of the Illinois circuit court approved the plan, even though it was directly contrary to Illinois law, which provided for pro-rata distribution. The money was distributed, and the estate was closed.

Within a month, the charities discovered what had happened, and retained Ernest to represent their interests in the will. Ernest petitioned the circuit court for various forms of relief, including reopening of the estate. During discovery, Ernest took depositions of the attorney who

drafted the will, the attorney who represented the executor, and the executor. Their testimony was contradictory, and several other facts discovered also raised suspicions. Ernest became convinced that his clients would receive a share of the estate only if fraudulent representations had been made by the executor or by the executor's attorney to the court at the October 8 hearing. Since the deposition testimony was contradictory, Ernest believed the deposition testimony of the judge was necessary to discover what had transpired at the hearing.

Ernest applied for a change of venue so the case would be assigned to another judge and he could take the discovery deposition of Judge Keenan. A hearing on the motion was held March 24, 1987.

Judge Keenan denied the motion, apparently because he doubted that a deposition could be taken from a judge regarding a case over which the judge had been presiding. In ruling, the judge referred to lack of authority cited to him no fewer than a dozen times, including the following closing of the hearing:

"THE COURT: . . . This is such a strange point to me, that in the absence of any kind of authority, I'm simply not willing to rule that the Court can do that. I don't believe that it would be proper in this case for either of the parties to issue a subpoena for a Judge in this situation, and unless you can show me some authority that it would be proper, and that Courts have sanctioned

that in the past, then I'm not in a position to grant this. The motion is denied.

"MR. ERNEST: Could we cite some authority --

"THE COURT: The motion has been denied."

[end of hearing]

Ernest consulted with his law partners that afternoon. They feared that the failure to cite authority on the record would doom an interlocutory appeal, and so concluded that a proper course of action would be to subpoena the judge for a discovery deposition. Their reasoning was that the opposing party would likely move to quash and the ensuing hearing would provide an opportunity to cite authority to the

court. That afternoon, Ernest caused a discovery deposition subpoena to issue to the judge.

Judge Keenan quashed the subpoena on his own motion the same day, and called Ernest before him the next morning, March 25, 1987. The judge questioned Ernest as to whether he had caused the subpoena to be issued. Even though the subpoena had been quashed, the judge purported to offer Ernest a chance to withdraw it, and when Ernest declined (he later testified that he both wished to protect the record and did not wish to say anything to anger the judge further), the judge cited Ernest for contempt:

"THE COURT: Okay. Then what I want to do at this point, since there is no

misunderstanding about that, is inform you that in my view that is directly contrary to both the spirit and intent of my ruling on that motion. I will at this time extend to you the opportunity to withdraw the subpoena. If you refuse to do so, then I think I'll have no alternative but to cite you for contempt.

"MR. ERNEST: Okay. I won't withdraw it, so you might as well do that.

"THE COURT: Very well. Then there will be a formal contempt citation issued and it will be served upon you."

Ernest was tried for contempt on April 28, 1987, before Judge Robert S. Hill of the Illinois circuit court. No prosecutor appeared. No evidence was presented on behalf of the people. The

only testimony was from Ernest, who explained his good faith reasoning behind his actions, and from Stephen G. Sawyer, Esq., the Wabash County State's Attorney, who testified on behalf of Ernest.

Despite this total absence of any evidence on the part of the prosecution, Judge Hill examined the transcripts of the hearings before Judge Keenan and convicted Ernest of contempt of court. Following a later hearing, Judge Hill fined Ernest $50. for the contempt.

Raising of Constitutional Issues

Following his conviction and sentence, Ernest brought a motion for new trial before Judge Hill. In that motion for new trial, Ernest asserted that his Constitutional rights had been violated

both because he "was not afforded the opportunity to confront and cross examine his accuser or the witnesses against him" and because "to the extent that the case was presented against the defendant, it was presented by the judge hearing the contempt. One cannot present the case for the prosecution and be an impartial trier of fact and to the extent this was done the defendant's Fourth (sic) and Fourteenth Amendment Rights of due process were violated."

The motion was heard August 13, 1987. Ernest in oral argument again asserted that his Constitutional rights had been violated.

"No witnesses testified against me whatsoever, not the first shred of evidence that the court was ever

embarrassed or disrupted was ever offered; but yet I was found guilty, I presume beyond a reasonable doubt. I think that that is a violation of my constitutional rights to due process. No independent prosecutor presented the case, Your Honor. In fact, the Wabash County State's Attorney appeared as a witness on my behalf at my trial. The trial judge, Your Honor sitting, stated on numerous occasions that you were not the prosecutor in the contempt case; yet to the extent that the case was presented at all against me, it was presented by the judge hearing the contempt. One cannot present the case for the prosecution and be an impartial trier of facts. And to the extent this was done my Fourth (sic) and Fourteenth Amendment rights to due process were

violated." [Transcript of Circuit Court Hearing of 8/13/87, p. 9]

Later in the hearing, Ernest said

"And if I, if my freedom or my liberty was in jeopardy I had the constitutional right to be confronted by and to cross examine witnesses against me. " [Transcript of Circuit Court Hearing of 8/13/87, p. 11]

Again, later in the hearing, Ernest said

"And I feel my constitutional rights were violated inasmuch as Judge Keenan never appeared before this court to testify that he had been embarrassed nor did the transcript state that he had been. And I didn't get the opportunity

to cross examine him on that basis." [Transcript of Circuit Court Hearing of 8/13/87, pp. 12-13]

The trial court rejected Ernest's constitutional arguments by holding that the case involved a direct criminal contempt (a contempt committed in the presence of the judge), and stating "In direct contempt, the respondent has no due process rights, except to make a statement in allocution prior to sanctions being imposed, whereas in an indirect contempt proceeding, the respondent is entitled to the full due process rights . . .." Opinion of the Illinois circuit court denying motion for new trial, dated 8/31/87, reproduced at A-76]

Ernest pressed his constitutional

rights before the Appellate Court of Illinois, claiming a due process violation in his brief, in an argument the brief summarized as follows:

"The contempt trial in this case violated the United States and Illinois Constitutions in that A) the prosecution did not appear or prosecute the case; B) no evidence was presented by the state and it did not meet its burden of proof; C) the defendant was not permitted to confront his accusers or cross examine witnesses against him and D) the judge undertook a prosecutorial role."

Ernest asserted in his brief a further due process violation in that his conduct did not constitute a contempt by constitutional standards. He cited In

re McConnell, 370 U.S. 230 (1962), as involving "a plaintiff's attorney who was attempting to make a record for the protection of his client." After summarizing the facts of the case, the brief points out "Justice Black, in an opinion reversing a contempt citation, held that no actual obstruction occurred . . .." Of course, McConnell was grounded in due process.

The Appellate Court, one judge dissenting, disposed of the claims by relying on Illinois state cases and concluding that because the contempt was direct, no prosecutor, evidence, or witnesses were necessary. [A-42 - A-59]

On appeal to the Supreme Court of Illinois, Ernest pressed the same constitutional arguments. As to the claim that the conduct could not

constitutionally be contemptuous, the Illinois Court relied exclusively on Illinois state cases. It ruled that Ernest had violated a direct court order and so distinguished precedents of this Court. [A-18 - A-32]. As to the claim that the trial violated due process and the right to confrontation, the Illinois Court rejected the reasoning of the lower courts and found the contempt to be indirect; despite that, the court affirmed on the theory that no prosecutor or evidence was necessary because the court could take judicial notice of the records of the proceedings in the probate matter. Again, the court relied entirely on Illinois state decisions. [A-32 - A-40]

ARGUMENT

I

THE DECISION OF THE SUPREME COURT OF ILLINOIS THAT ERNEST'S REQUEST OF A SUBPOENA FOR THE JUDGE CONSTITUTED CONTUMACIOUS CONDUCT BEYOND THE PROTECTION OF THE DUE PROCESS CLAUSE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

This case presents an important question to all lawyers of the limits of permissible advocacy. Decisions of this Court have made clear that a lawyer's good faith actions to advance the interests of a client are constitutionally protected by due process, so long as they do not pose an obstruction or imminent threat to the administration of justice. The Illinois decision ignores these decisions, creating a conflict with the decisions of this Court.

Three decisions of this Court have

established the law in this area. The first was In re McConnell, 370 U.S. 230 (1962), in which a federal district judge had summarily found defendant in criminal contempt both for repeated attempts to make offers of proof despite the court's instructions to desist, and for defendant's statement that he intended to continue to do so until a bailiff stopped him. This Court reversed. The Opinion of the Court said this:

"The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." Id. at 236.

Even more directly applicable is Holt v. Virginia, 381 U.S. 131 (1965), which involved unflattering statements about the judge made by an attorney in a change of venue motion in state court. Again this Court reversed a contempt conviction. The Opinion of the Court said this:

"It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties. . . . Consequently, neither Dawley nor his counsel could consistently with due process be convicted for contempt for filing these motions unless it might be thought that there is something about the language

used which would justify the conviction." Id. at 136-137.

Following McConnell and Holt, the Court summarily reversed a contempt conviction in the state court for intemperate statements made during summation. The Court said that due process will not allow a contempt conviction for vigorous advocacy that does not "constitute an immiment. . . threat to the administration of justice." In re Little, 404 U.S. 553, 555 (1972).

These three decisions clearly establish that the due process clause protects vigorous advocacy that does not constitute an obstruction or imminent threat to the administration of justice. One commentator has said "[T]he content

of legitimate advocacy appears, under Holt, immune to the contempt power, because, by definition, such advocacy cannot be deemed obstructive of justice." Raveson, "Advocacy and Contempt: Constitutional Limits on the Judicial Contempt Power," 65 Wash. L. Rev. 477, 508 (1990).

The Illinois decision, given that every case has slight shadings of facts, conflicts directly with these three opinions of this Court. The decision also conflicts with the reasoning of Eaton v. City of Tulsa, 415 U.S. 697 (1974), which summarily reversed a criminal contempt conviction, for use of a profanity in open court. The Court repeated that no contempt was committed because no imminent threat to the administration of justice was created.

The conflict between these four Court opinions and the Illinois decision is so direct that summary treatment as in Little and Eaton may be appropriate.

The Illinois decision skirts the constitutional protections of legal advocacy that this Court has established. Ernest's only act alleged to be contumacious was to request issuance of a subpoena from a court clerk. He violated no direct court order; no order not to issue a subpoena appears in the transcript of the hearing on the motion to change venue and no such order can fairly be implied from the language used by the court. Ernest in good faith believed that his action was necessary to be able to meet the court's demand for citation of authority. His efforts to advocate the

interests of his charitable clients, short of an imminent threat to the administration of justice, fell well within the protection of the due process clause.

Other courts have had no difficulty following the decisions of this Court, and have applied the imminent threat requirement as announced by this Court. These courts include the Second Circuit [In re Williams, 509 F.2d 449 (2d Cir. 1975)], the Third Circuit [Pennsylvania v. International Union of Operating Engineers, 552 F.2d 498 (3d Cir. 1977)], the Ninth Circuit [e.g., Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973)], and the Supreme Court of South Carolina [State v. Harper, 376 S.E.2d 272 (S.C. 1989)]. Consequently, this Illinois decision on the federal question of the scope of due

process protection for legal advocacy also conflicts with decisions of these Courts of Appeals and state court of last resort, and so also warrants review under Supreme Court Rule 10.1(b).

The Illinois decision should not be allowed to create such a direct conflict with the decisions of this Court and other courts on this question of federal law that is of great importance to all lawyers.

II

THE DECISION OF THE SUPREME COURT OF ILLINOIS THAT ERNEST'S TRIAL SATISFIED DUE PROCESS STANDARDS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

This criminal defendant was required to prove he was not guilty. That is the only conclusion to be drawn from the history of this case. Surely, due

process cannot countenance a criminal trial in which a defendant was found guilty beyond a reasonable doubt when no prosecutor appeared and no evidence was presented on behalf of the people.

First, this Court only four years ago held that due process would not allow a criminal contempt to be prosecuted by a private attorney who represented the opposing party in the underlying civil litigation. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987). Great concern was expressed by this Court that such a person would not have the detached objectivity required of a public prosecutor. Certainly, due process cannot be any more satisfied when no prosecutor even appears. While the facts differ somewhat, this case presents a conflict with Young. In

effect, the Illinois circuit court acted as prosecutor, judge, and trier of fact. In re Murchison, 349 U.S. 133 (1955), is only one of this Court's opinions that disapproves a unification of prosecutorial and judicial functions of this nature.

Second, criminal contempt "is a crime in the ordinary sense." Bloom v. Illinois, 391 U.S. 194, 201 (1968). Each element of the crime must be proved by the state beyond a reasonable doubt. One element is intent. Hawk v. Cardoza, 575 F.2d 732, 734-35 (9th Cir. 1978); In re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972). This Court has held that due process prevents conviction for criminal contempt of a lawyer who in good faith counsels his client to assert the privilege against self-

incrimination. Maness v. Meyers, 419 U.S. 449 (1975).

In this case, the only evidence on the element of good or bad faith of defendant Ernest was his own unimpeached testimony. Ernest explained to the court his reasoning behind his actions. He believed the subpoena was necessary to protect his clients' interests, and he reached that conclusion after consulting with his law partners. Even should judicial notice of the prior court record suffice to convict on other elements--and Ernest does not for one second concede that--absolutely no evidence of intent is found in that record. Due process cannot countenance a conviction on the state's evidence on intent here.

With further regard to proof of the

crime beyond a reasonable doubt, the practical effect of the procedure countenanced by Illinois was to presume Ernest guilty and tell him to prove he was not guilty. Such a procedure violates due process in much the same manner that this Court determined only three years ago in Hicks v. Feiock, 485 U.S. 624 (1988). Again, at least an indirect conflict with a decision of this Court is presented.

III

THE DECISION OF THE SUPREME COURT OF ILLINOIS THAT DEFENDANT'S CONFRONTATION RIGHT WAS NOT VIOLATED CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioner Ernest was denied his right to confront the witnesses against him. Conviction on judicial notice without any attempt whatsoever to obtain the live testimony of the only witness

against the defendant, the judge who charged him, and who was easily available, certainly conflicts with the necessity requirement set forth by this Court that "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Ohio v. Roberts, 448 U.S. 56, 65 (1980). Another opinion emphasizing this requirement is Barber v. Page, 390 U.S. 719 (1968). Even were Roberts limited to the former testimony hearsay exception, that is the closest analogy to the current situation. Ernest certainly had absolutely no opportunity to cross-examine his accuser.

This violation is so plain nothing more need be said, and again, summary

treatment may be appropriate. Here also, the Illinois court has disregarded this Court's decisions and created a conflict with them.

CONCLUSION

Petitioner Ernest respectfully requests that the Court grant a writ of certiorari in this case because the decision of the Supreme Court of Illinois conflicts in several important ways with applicable decisions of this Court, and also with decisions of other federal and state courts. A decision of this Court will provide much needed additional guidance to civil attorneys on the important federal question of due

process protection on the scope of permissible advocacy.

Respectfully submitted,

Douglas D. McFarland
Counsel for Petitioner

Docket No. 69318-Agenda 10-May 1990

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,

v. STANTON D. ERNEST, Appellant.

JUSTICE MILLER delivered the opinion of the court:

In a proceeding in the circuit court of Wabash County, the defendant, Stanton D. Ernest, an attorney licensed to practice law in the State of Illinois, was found to be in direct criminal contempt and fined $50 after he caused a subpoena for a discovery deposition to be issued to the judge presiding in a case in which the defendant was appearing as counsel. The Appellate court, with one justice dissenting, affirmed the contempt finding. (188 Ill. App. 3d 987.) We allowed defendant's petition for leave

to appeal (107 Ill. 2d R. 315(a)).

The present matter arises from and is collateral to certain proceedings before the circuit court of Wabash County concerning the administration and settlement of the estate of Merrill H. Wright. A brief review of the proceedings in the underlying action will provide relevant background for the disposition of this appeal.

Merrill H. Wright died testate on January 30, 1986. His will, which made cash bequests in excess of $300,000 to various individuals and nonprofit organizations, was later admitted to probate in the circuit court of Wabash County. On October 8, 1986, Richard O. Wright, the executor of the state, and his attorney, Rick L. Hobler, appeared before the Honorable Robert M. Keenan

for a hearing on the final account of the estate. The executor represented in the final account that the estate contained less than $98,000 available for distribution, an amount that was not sufficient to fund totally the testator's individual bequests. The executor proposed to distribute the estate by fully satisfying the bequests contained in each succeeding paragraph of the will until the available funds were exhausted. Under the proposed scheme, a number of general bequests contained in later paragraphs of the will would go completely unsatisfied. Notice of the hearing on the final account had been provided only to those beneficiaries who were to receive funds under the executor's proposal.

The trial judge entered a written

order on October 8, 1986, approving the proposed distribution. The docket sheet for that date contains the follcwing notation: "Executor and counsel appear, no objections filed, no objectors present; account examined and approved per written order signed and filed." No report was made of the proceeding.

On November 7, 1986, defendant filed a petition in the circuit court of Wabash County seeking to reopen the estate. (See Ill. Rev. Stat. 1987, ch. 110 1/2, par. 24-9.) The defendant filed the petition on behalf of a number of beneficiaries whose bequests had not been funded under the distribution plan previously approved by the court. An amended petition alleged, among other things, that the final distribution was made without notice to all interested

parties, that the testator's attorneys-in-fact, one of whom was the executor, had misappropriated assets of the estate, and that the executor wrongfully failed to abate the bequests by distributing the assets of the estate proportionately among the general legatees, as required by statute (see Ill. Rev. Stat. 1987, ch. 110 1/2, par. 24-3(b)).

On March 17, 1987, defendant filed a motion for substitution of judge pursuant to section 2-1001(a)(1) of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2-1001). The motion alleged that Judge Keenan was a material witness to the proceedings on the final account of the estate. At a hearing before Judge Keenan on March 24, 1987, defendant asserted that investigation

was needed to determine whether any fraudulent misrepresentations were made at the October 8, 1986, hearing that would have prompted the court to approve the executor's proposed distribution. Defendant asserted that Judge Keenan's testimony regarding the hearing would be material. Defendant noted that no record of the hearing was available and that, to his knowledge, the executor's and the executor's counsel were the only persons other than Judge Keenan who were present at the hearing.

Judge Keenan denied the motion for substitution of judge. He observed that the docket entry for the October 8, 1986, proceeding did not indicate that evidence was introduced or arguments were made on that occasion and, further,

that the petition to reopen the estate contained no allegations of fraud. Judge Keenan believed that permitting a litigant to call as a witness the judge who was presiding over a matter could lead to disqualification in almost every case, for a party might call the judge to testify whenever a dispute arose about events occurring in the courtroom. Finally, Judge Keenan noted that defendant, as the movant, had failed to present authority in support of his position. At the conclusion of the hearing Judge Keenan stated:

"I don't believe that it would be proper in this case for either of the parties to issue a subpoena for a Judge in this situation, and unless you can show me some authority that it would be proper, and that the Courts have

sanctioned that in the past, then I'm not in a position to grant this. The motion is denied."

Defendant than asked whether he could cite authority but the judge replied that the motion had been denied.

On the following day, March 25, 1987, defendant appeared in Judge Keenan's courtroom at the judge's request. According to the transcript made on that occasion, upon defendant's arrival, Judge Keenan stated that he had learned of the issuance of a deposition subpoena directed to him. Judge Keenan explained that he denied defendant's motion for substitution of judge because there is no authority to support the view that a party may request testimony from the judge who is presiding over the party's case. In response to Judge Keenan's

questions, defendant acknowledged that he was aware of the basis for the court's ruling on the substitution motion, and defendant admitted that he had caused the subpoena to be issued with full knowledge of the basis for the ruling on the motion. Judge Keenan told defendant that issuance of the subpoena was "directly contrary to both the spirit and intent" of the ruling denying the substitution motion. The judge then afforded defendant an opportunity to withdraw the subpoena and stated that defendant would be cited for contempt if he refused. Defendant replied, "I won't withdraw it, so you might as well do that." Judge Keenan then ordered the discovery subpoena quashed and informed defendant a formal contempt citation would be issued.

Judge Keenan thereafter issued findings and entered an order requiring defendant to show cause why he should not be held in contempt of court. The order charged defendant with committing a contumacious act in derogation of the court's authority. The order recited the relevant events that took place during the hearing held March 24, 1987, on the motion for substitution of judge and during defendant's court appearance on March 25, 1987. Judge Keenan referred the matter to the chief judge of the circuit for reassignment.

On April 28, 1987, defendant and his counsel appeared before the circuit judge to whom the case had been assigned for the hearing on the contempt citation. At the beginning of the hearing, the judge noted the absence of

a prosecutor and advised defendant that the court would not assume that role. In his testimony at the contempt hearing, defendant explained that he filed the motion for substitution of judge because he believed that Judge Keenan was a material witness to the October 8, 1986, hearing, when the executor's final account had been approved. Defendant explained that he believed that his clients could recover punitive damages if the executor were shown to have acted fraudulently. He also stated his belief that any judgment of that nature would not be dischargeable in bankruptcy. He further believed that without proof of fraud, his clients could not recover the distributions that had already been made to other beneficiaries from the assets of the estate. Defendant further

testified that after the hearing on the motion for substitution of judge, he had prepared a subpoena for discovery deposition of Judge Keenan and caused it to be issued by the circuit clerk of Wabash County. Defendant explained that he pursued this course of action. rather than attempting to take an immediate appeal from the denial of the substitution motion, because the record was virtually devoid of evidence of the materiality of Judge Keenan's testimony. Defendant believed that without Judge Keenan's deposition testimony he could not prevail in an appeal from the denial of the substitution motion.

Defendant also testified that he believed the motion was denied because he had failed to cite authority demonstrating that a party may call a

presiding judge as a witness. Defendant had reasoned that the subpoena would prompt opposing counsel to file a motion to quash, which would have allowed defendant to respond with authority in support of his position. Finally, defendant testified that he believed that issuance of the subpoena would preserve for appeal the issue of whether he could call Judge Keenan to testify about what occurred at the October 8 hearing.

At the contempt hearing, defendant also presented the testimony of an attorney who frequently practiced before Judge Keenan. The attorney described Judge Keenan as meticulous and stated that it was Judge Keenan's custom to follow rules of procedure carefully, even in uncontested matters. The

witness stated that in probate matters Judge Keenan often asks personal representatives or their counsel for more information, or confers with them on matters at issue, frequently off the record. The trial judge then heard summation by defendant's counsel and granted defendant leave to submit a post-hearing memorandum.

On May 26, 1987, the trial judge issued a written opinion finding defendant in contempt of court. The trial judge reasoned that because the denial of the motion for substitution of judge was based on Judge Keenan's belief that he was not a material witness to the controversy, defendant's actions in causing the discovery subpoena to be issued were sufficiently embarrassing and disruptive to constitute contempt.

The trial judge further believed that defendant's claim of good faith was irrelevant. At a later hearing, the judge fined defendant $50.

Defendant subsequently filed a motion for a new hearing, challenging the sufficiency of the evidence and the adequacy of the procedures employed at the hearing. The trial judge denied the defendant's motion. In a memorandum of opinion, the judge stated that defendant's conduct constituted direct criminal contempt and that the procedures followed at the contempt hearing were adequate. The trial judge also found that the announcement by Judge Keenan that he did not believe it would be proper for either party to issue a subpoena amply preserved a record on which defendant's clients

could base an appeal. Defendant was thus not justified in causing the circuit court clerk to issue the subpoena for Judge Keenan's discovery deposition.

The appellate court, with one justice dissenting, affirmed the circuit court's judgment. (188 Ill. App. 3d 987.) The court concluded that defendant's conduct was contumacious. The court believed that a judge could not be a witness in a case in which he is presiding and that defendant's actions in securing the issuance of the discovery subpoena therefore tended to embarrass and obstruct the court in its administration of justice. The appellate court also rejected defendant's contention that the contempt proceeding did not comport with due process, concluding that adequate

procedures were employed at the hearing. 188 Ill. App. 3d at 990-92.

The dissenting justice agreed with the majority's conclusion that a judge should not testify in a proceeding over which that judge is presiding. The dissenting justice emphasized that the subpoena here was issued solely for the purpose of taking the presiding judge's discovery deposition, however, and that the judge's testimony might not have been required at trial. The dissenting justice believed that the majority's result would always place a trial judge beyond the reach of discovery processes, regardless of the circumstances. The dissenting justice therefore would have reversed the trial judge's finding of contempt. 188 Ill. App. 3d at 993 (Harrison, J., dissenting).

Before this court, defendant, appearing pro se, argues that it is proper for an attorney to request the issuance of a subpoena for a discovery deposition to a judge presiding in a case, and that such conduct therefore is not contumacious. The defendant alternatively contends that the hearing provided to him failed to comply with the requirements of due process. The Law Offices of Robert L. Douglas, Ltd., which replaced defendant as counsel in the underlying action, have been granted leave to submit a brief as amicus curiae in defendant's behalf (see 107 Ill. 2d R. 345).

I

A court has the inherent power to

punish, as contempt, conduct that is calculated to impede, embarrass, or obstruct the court in its administration of justice or derogate from the court's authority or dignity, or to bring the administration of the law into disrepute. (In re Estate of Melody (1969), 42 Ill. 2d 451, 452.) A finding of criminal contempt is punitive in nature and is intended to vindicate the dignity and authority of the court. (People ex rel. Chicago Bar Association v. Barasch (1961), 21 Ill. 2d 407, 409.) Nonetheless, "its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions." Cooke v. United States (1925), 267 U.S. 517, 539, 69 L. Ed. 767, 775, 45 S. Ct. 390, 396.

Defendant argues that his causing a

discovery subpoena to be issued to Judge Keenan was not contumacious conduct. In support of this argument, defendant cites the provision in Supreme Court Rule 202 (107 Ill. 2d R 202) that authorizes a party to "take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the action." Defendant notes that the rule refers to the taking of the deposition "of any person," and he concludes that a judge presiding in a matter is within the scope of the rule.

In response, the State asserts that it was not defendant's isolated act of causing the subpoena to be issued that was found contumacious by the trial court. Instead, the State argues, the

trial court found defendant's action contumacious in light of Judge Keenan's earlier ruling on the motion for substitution of judge. The State contends that defendant's subsequent request that the subpoena issue was tantamount to violating a direct order of the trial court. The State observes that criminal contempt may be found when a defendant has willfully disobeyed a lawful court order. See Gompers v. Bucks Stove & Range Co. (1911), 221 U.S. 418, 442-43, 55 L. Ed. 797, 806, 31 5. Ct. 492, 498-99.

We agree with the reasoning expressed by the appellate court in the present case that allowing a party to require a judge presiding in a case to testify or to submit to a discovery deposition in the proceeding, without the party's

first asking leave to do so, would compromise the authority and dignity of the court. It is imperative that a court avoid situations where its impartiality might reasonably be questioned. Under our Code of Judicial conduct, a judge is required to disqualify himself if he is "likely to be a material witness in the proceeding." (See 113 Ill. 2d R. 63(C)(1Xe)(iv).) We therefore cannot agree with defendant that Supreme Court Rule 202 grants to parties the unqualified right to subpoena a judge presiding over a matter to submit to a discovery deposition in the case. Such a finding would give the parties a powerful influence in the judge's decision whether to withdraw, and, as the appellate court stated, "would lead

to the most obvious mischief." 188 Ill. App. 3d at 990.

Of even greater concern, however, is that defendant's allegedly contumacious conduct followed Judge Keenan's denial of the motion for substitution of judge. In causing the issuance of the subpoena, defendant acted in apparent defiance of Judge Keenan's reason for denying the substitution motion. Judge Keenan believed that it would be improper for any of the parties to subpoena the presiding judge in the case. We must conclude that by doing so, defendant's conduct disparaged the court's authority and dignity.

Defendant argues however that his actions not directly contrary to Judge Keenan's order and were, therefore, not contumacious. Defendant emphasizes that

the only order issued by the judge during the proceeding was the denial of his clients' motion for substitution of judge; that order, defendant argues did not direct him to perform or to refrain from performing any particular action. Citing People v. Wilcox (1955), 5 Ill. 2d 222, defendant argues that a person may be found in contempt for failure to obey a court order only when the order is clear, certain, and concise. In Wilcox, the trial court cited the defendant for contempt upon learning that she filed two motions with the clerk of the court after the judge allegedly denied her leave to do so. The defendant admitted on appeal that the judge refused to consider the motions, but she denied that the court instructed her that she could not file the

documents. In reversing the contempt order, the court in Wilcox determined that "there is no showing in the record that an order was clearly given or understandingly received." Wilcox, 5 Ill. 2d at 229.

The situation here differs from that in Wilcox. Judge Keenan's explanation of his reason for denying the motion for substitution of judge might not, in itself, have constituted an order clearly given. Nonetheless, when defendant appeared before Judge Keenan the next day, defendant acknowledged that he understood the order. Judge Keenan stated that defendant's actions were directly contrary to both the spirit and intent of the earlier ruling and stated that defendant would be cited for contempt if he did not withdraw the

subpoena. Only after defendant refused to do so did Judge Keenan issue the order to show cause. To allow defendant the ability to escape a contempt citation, when it is clear from the record that defendant understood the implications of his actions, merely because the order at first may have been ambiguous would significantly disparage the authority of the trial court.

A court must he presented with willful conduct on the part of the alleged contemnor before citing him for contempt. (People v. L.A.S. (1986), 111 Ill. 2d 539, 544.) A contumacious state of mind may be inferred from the actions of the party and from the surrounding circumstances. (See People ex rel. Kunce v. Hogan (1977), 67 Ill. 2d 55, 61.) In the present case, defendant's

refusal to withdraw the subpoena for Judge Keenan's discovery deposition after the judge stated that issuance of the subpoena was contrary to his previous ruling is sufficient to establish willful conduct on the part of defendant. Under these circumstances, the duty of counsel to safeguard the interests of his client does not permit induigence in contumacious conduct.

Defendant also cites several cases that, he argues, recognize a judge as a competent witness of matters that took place before that judge in a former trial or proceeding of the cause. (See People v. Washington (1967), 38 Ill. 2d 446; People v. Wilson (1967), 37 Ill. 2d 617; People v. Short (1978), 66 Ill. App. 3d 172.) The propriety of Judge Keenan's order denying the motion for

substitution of judge, however, is not before us. A court order made within the proper exercise of jurisdiction. no matter how erroneous, must be obeyed until the order is modified or set aside by the trial court or reversed on appeal. (Cummings-Landau Laundry Machinery Co. v. Koplin (1944), 386 Ill. 368, 385.) It may be noted that the cause before us does not present a situation where a defendant commits contempt of court by refusing to comply with an interlocutory pretrial discovery order, a method previously endorsed by this court as an appropriate means of challenging a trial judge's ruling. (See, e.g., People ex rel. Scott v. Silverstein (1981), 87 Ill. 2d 167, 171-72.) Here, compliance with an erroneous order does not compromise the litigant's

case.

As a final matter, defendant cites Holt v. Virginia (1965), 381 U.S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375, and argues that the issuance of a subpoena for a discovery deposition is a right that cannot be denied by threat of contempt. In Holt, an attorney filed on his own behalf in a contempt proceeding a motion requesting that the trial judge disqualify himself and, after that motion was denied, filed a motion for change of venue. Both motions alleged bias on the part of the judge. The judge cited the attorney and his counsel for contempt after counsel read to the court the contents of the motion, which detailed the allegations of bias, during argument on the motion. On appeal, the Court in Holt held that the defendant in

the contempt proceeding had a right to file motions and pleadings essential to present claims and raise relevant issues. In addition, the Court found that the allegations made in the motions were wholly appropriate to charge bias. Holt, 381 U.S. at 136, 14 L. Ed. 2d at 293, 85 S. Ct. at 1378.

We do not read Holt as extending to the ability of a party to cause a discovery subpoena to be issued to a presiding judge once that judge has ruled that such a subpoena would be improper. The Court in Holt explicitly noted that the petitioners were not charged with disobeying a valid court order. (Holt, 381 U.S. at 136, 14 L. Ed. 2d at 293, 85 S. Ct. at 1377-78.) We are aware that defendant believed that issuance of the subpoena was required to

preserve the issue for appeal and therefore was in the best interest of his clients. We do not believe that issuance of the subpoena was necessary, and we consider that defendant's actions overstepped the bounds of strenuous and persistent advocacy. In the motion for substitution of judge, defendant presented his clients' assertion that it was crucial that Judge Keenan testify concerning the October 8, 1986, hearing. Unlike the situation in Holt, therefore, the relevant issue had already been raised. Yet defendant did not request that Judge Keenan certify a question of law for an interlocutory appeal pursuant to Supreme Court Rule 308 (107 Ill. 2d R. 308). Nor did defendant seek leave to cause a discovery subpoena to be issued to Judge Keenan, citing authority in

favor of his request. Defendant instead placed himself in a posture directly contrary to Judge Keenan's ruling, in an inappropriate attempt to trigger the procedural mechanism for its review.

II

Having concluded that defendant's conduct was contumacious, we must next consider whether the procedures followed at the contempt hearing were sufficient to satisfy the requirements of due process. A contemnor's due process rights may be severely restricted if the contumacious act takes place in open court and within the presence of the judge, and if immediate punishment of the contemnor is essential to prevent the demoralization of the court's authority before the public. (In re

Oliver (1948), 333 U.S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499, 509; Cooke v. United States (1925), 267 U.S. 517, 534-35, 69 L. Ed. 767, 773, 45 S. Ct. 390, 394.) In those instances, the proceeding may be conducted in a summary manner, without prior notice, written charge, plea, issue, or trial. (Ex parte Terry (1888), 128 U.S. 289, 309, 32 L. Ed. 405, 410, 9 S. Ct. 77, 81; People v. Siegal (1948), 400 Ill. 208; 211.) Once it is decided that invocation of the summary contempt power is not warranted, however, guarantees of due process require "that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a

chance to testify and call other witnesses in his behalf, either by way of defense or explanation." Oliver, 333 U.S. at 275, 92 L. Ed. at 695, 68 S. Ct. at 508.

We believe that the present matter falls outside the narrow range of contempts that may be punished summarily. Here, the judge whose authority defendant flouted did not immediately cite defendant for contempt but instead issued an order to show cause and had the matter reassigned to a different judge for hearing. (See Mayberry v. Pennsylvania (1971), 400 U.S. 455, 463-64, 27 L. Ed. 2d 532, 539, 91 S. Ct. 499, 504; Cooke, 267 U.S. at 539, 69 L. Ed. at 775, 45 5. Ct. at 395-96.) The delay in conviction and punishment of the contemnor demonstrates

that the court was not required to act summarily so that it could maintain order and proceed with its business. (See Taylor v. Hayes (1974), 418 U.S. 488, 498, 41 L. Ed. 2d 897, 907, 94 S. Ct. 2697, 2703, quoting Groppi v. Leslie (1972), 404 U.S. 496, 504, 30 L. Ed. 2d 632, 639, 92 S. Ct. 582, 587.) Defendant was therefore entitled to the rights guaranteed by due process provisions of the Federal and State Constitutions (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2). See Harris v. United States (1965), 382 U.S. 162, 164, 15 L. Ed. 2d 240, 242, 86 S. Ct. 352, 354 (summary contempt power limited to misbehavior in the actual presence of the court).

Defendant argues that the contempt in the present case was indirect rather

than direct and that the proceeding did not satisfy the requirements of due process. Defendant believes that the proceeding was defective because no prosecutor appeared on behalf of the State, because the trial judge improperly assumed the role of prosecutor at the hearing, because no evidence was presented against him in the hearing to establish his guilt beyond a reasonable doubt, and because he was denied his right to confront the witnesses against him. The State responds that, even if defendant's actions did not warrant invocation of the summary contempt power, the hearing was valid and defendant was provided sufficient opportunity to assert any defense he might have.

We conclude that the present

proceeding satisfied the requirements of due process. The order to show cause issued by Judge Keenan notified defendant of the charges against him. At the contempt hearing, the defendant appeared with counsel and he was afforded the opportunity to explain the reasons for his actions and to present any defense he might have. Defendant exercised those rights, offering testimony and argument in support of his position.

In the circumstances here, there was no need that the matter be presented through a prosecutor. The charge against defendant was properly before the court on Judge Keenan's order to show cause. The records and transcripts of the underlying action, of which the trial court was authorized to take judicial notice (see City of East St.

Louis v. Touchette (1958), 14 Ill. 2d 243, 249), provided the necessary proof of defendant's guilt; there was no need to submit further evidence to establish the charge. In addition, the subpoena demonstrated on its face that defendant caused its issuance; any doubt whether defendant had requested its issuance was; of course, eliminated by defendant's own statements, first before Judge Keenan and later at the contempt hearing, acknowledging that he had done so. (See People v. Sears (1971), 49 Ill. 2d 14, 32.) Nor can it be said that the trial judge improperly assumed a prosecutorial role by questioning defendant at the contempt hearing. (See People v. Wesley (1959), 18 Ill. 2d 138, 155 (court may question witness to elicit truth or clarify issue).) In the

present case, the trial judge specifically advised defendant that the court would not act as prosecutor during the contempt proceeding, and the questions asked by the judge were intended only to clarify certain issues in the case.

We must also reject defendant's contention that he was denied an an opportunity to confront the witnesses against him. No witnesses were necessary to establish the contempt, and none were presented. As we have indicated, the defendant's conduct before Judge Keenan was a matter of record, and that evidence was properly before the court at the contempt hearing. Under the circumstances of this case, the trial judge could find the defendant guilty beyond a reasonable

doubt from the record at hand, without the submission of additional evidence. See People v. Howarth (1953), 415 Ill. 499, 508-09.

Citing In re Marriage of Betts (1989), 190 Ill. App. 3d 961, 966-67, defendant also argues that the contempt finding is void because the trial judge did not expressly state, either during the proceeding or in the written order, that defendant was guilty beyond a reasonable doubt. We find such a requirement unnecessary, at least when it is apparent from the proceedings, as it is here, that defendant's found guilt was established by that standard of proof.

For the reasons stated, we conclude that defendant's conduct was sufficiently contumacious, in the circumstances shown here, to constitute

contempt of court, and that defendant's contempt hearing satisfied the requirements of due process. The judgment of the appellate court, which affirmed the judgment of the circuit court of Wabash County, is therefore affirmed.

Judgment affirmed.

5-87-0660
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STANTON D. ERNEST, Defendant-Appellant	)	Appeal from the Circuit of Wabash County. No. 86-P-11 Honorable Robert S. Hill, Judge Presiding

JUSTICE HOWERTON delivered the opinion of the court:

Defendant, a lawyer, was found guilty of direct criminal contempt for subpoenaing a judge. We affirm.

Defendant, retained by beneficiaries who had not received notice of final accounting in an estate, concluded that he needed the testimony of the judge who was presiding over the case, Robert Keenan, to determine if there had been fraud in the final accounting.

Defendant filed a motion for substitution of judges, intending to subpoena and depose the judge to discover what had happened at the hearing on the final accounting. The substitution motion was denied, the court noting that he did not believe that a judge could be subpoenaed under those circumstances.

Defendant had a subpoena issued for one judge, who, in response, had defendant appear before him later that day.

Defendant was asked if he understood that the basis of the denial of the motion to substitute was that there was no authority for a judge to give testimony in a case in which he was presiding defendant said he did. The judge asked if he had issued the

subpoena and defendant admitted that he had. The judge then extended an opportunity to withdraw the subpoena and told defendant that if he did not, he would be cited for contempt. Defendant said, "I won't withdraw it, so you might as well do that."

Judge Keenan drafted a formal order, calling it a "rule to show cause," which set forth the facts surrounding the incident and the matter was referred to Judge Hill for disposition.

Judge Hill held a hearing, found defendant in direct criminal contempt and fined him fifty dollars.

All agree, the contempt was criminal, not civil; its effect was punishment, not coercion.

Defendant claims that: (1) having the subpoena issued was not contumacious;

and (2) the hearing he was given by Judge Hill violated both the United States Constitution and the Illinois Constitution, because: (a) no prosecutor appeared for the state; (b) no evidence was presented against him in the hearing; (c) he was deprived of his right to confront and cross-examine his accusers because no witnesses testified against him in the hearing; and (d) Judge Hill improperly undertook a prosecutorial role at the hearing.

The threshold question is whether defendant's conduct was contumacious.

Contumacious conduct consists of verbal or non-verbal acts which:

> (1) embarrass or obstruct the court in its administration of justice or derogate from its authority or dignity;
>
> (2) bring the administration of justice into disrepute; or

(3) constitute disobedience of a court order or judgement.

See People ex rel. Kunce v. Hogan (1977), 67 Ill. 2d 55, 364 N.E.2d 50; People v. L.A.S. (1986), 111 Ill. 2d 539, 490 N.E.2d 1271.

Specific intent is not a necessary predicate for criminal contempt. "Whether a contempt has been committed depends upon the act and not the alleged intention of the offending party." (Kneisel v. Ursus Motor Co. (1925), 316 Ill. 336, 342, 147 N.E. 143, 244.) In terms of common law analysis of mens rea, therefore, a general intent is all that is required. Thus, intent, knowledge, or recklessness will satisfy the mens rea.

We believe that the issuance of the subpoena was contumacious.

A judge cannot and should not be a

witness in a case in which he is presiding. If a subpoena were obeyed, the judge would be forced off the case, giving a litigant a powerful, but illicit tool. To permit it would lead to the most obvious mischief.

Granted, the subpoena was for discovery, not testimony, implying that defendant merely wanted to find out if the judge had any useful evidence. Nevertheless, it put the court in the embarrassing position of being interrogated in discovery in the same case over which he had jurisdiction. Therefore, the issuance of the discovery subpoena tended to obstruct the court in its administration of justice, and derogate from its authority and dignity. Imagine the spectacle of a judge objecting to deposition questions

asked of him in some case over which he presides--a spectacle simply because the judge ruling would be the judge objecting.

The filing of a subpoena with the clerk under these circumstances had the tendency to embarrass and obstruct the court, and although the filing was out of the immediate presence of the judge, it was within an integral part of the court. People ex rel. Kunce v. Hogan (1977), 67 Ill.2d 55, 364 N.E.2d 50; In re Estate of Melody (1969), 42 Ill.2d 451, 248 N.E.2d 104; People v. Andalman (1931), 346 Ill. 149, 178 N.E.2d 412.

Furthermore, defendant had a remedy for the denial of his motion for substitution of judges. After all, he could have appealed the court's ruling rather than subpoena the court.

The contempt must next be categorized as direct or indirect. The difference between direct and indirect contempt is that no evidentiary hearing is necessary to prove direct contempt, but is required to prove indirect contempt. People v. L.A.S. (1986), 111 Ill. 2d 539, 490 N.E.2d 1271.

Production of evidence is not necessary to establish direct contempt, because the conduct has occurred in the presence of the court, making all of the elements of the offense within the court's own personal knowledge. People v. L.A.S. (1986), 111 Ill. 2d 539, 490 N.E.2d 1171.

On the other hand, production of evidence is necessary to establish indirect contempt because an essential part of the conduct occurred outside of

the presence of the court, is not admitted, and therefore, depends for its proof upon evidence of some kind. People v. L.A.S. 11986), 111 Ill. 2d 539, 490 N.E.2d 1171.

In this case, the contempt is direct for two reasons. First, the subpoena on its face showed that defendant had it issued, and since the court can take judicial notice of its own files, the essential facts were within the judge's own knowledge. Second, defendant admitted to Judge Keenan that he had the subpoena issued. Therefore, all the essential facts were within the court's own knowledge. No evidence was necessary; no hearing was required.

We next address defendant's claim that the way the hearing was conducted violated the United States Constitution

as well as the Illinois Constitution.

The hearing conducted before Judge Hill did not violate the United States Constitution or the Illinois Constitution, defendant's claims to the contrary notwithstanding.

Where a controversy between the judge and the contemnor is integrated with the alleged contumacious conduct and embroils the judge to the degree that te judge's objectivity reasonably can be questioned, the issue of whether contempt has been committed as well as imposition of sanctions should be referred to another judge. (See Mayberry v. Pennsylvania (1971), 400 U.S. 455, 91 S.Ct. 499, 17 L.Ed.2d 531.) When the facts here are compared with the facts in Mayberry, it is safe to say that Judge Keenan could have handled

this case himself. However, he apparently felt better referring it and we do not criticize that decision.

When such a case is referred, the judge before whom the contempt was committed should specify the acts of contempt in writing and direct that a record of the proceedings surrounding the acts be prepared. Both the transferring judge's charge of contempt and the transcript are forwarded to the judge to whom the case has been assigned. The judge hearing the matter shall base his findings and adjudication of the contempt charge solely on the transferred written charge and record. (Mayberry v. Pennsylvania (1971), 400 U.S. 455, 91 S.Ct. 499, 17 L.Ed.2d 531. See also Taylor v. Hayes (1974), 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d

897.) Judge Keenan's contempt charge, called by him a "rule to show cause," has been reviewed and found to constitute a valid charge of contempt. The upshot of all this is that no prosecutor was needed, no evidence needed to be presented and no witnesses had to testify. The purpose of the referral was to avoid imposition of criminal sanctions by a court still smarting under the contempt. It did not transform this direct contempt into indirect contempt. Therefore, defendant was not deprived of his rights of confrontation and cross-examination. In re Grand Jury Investigation of Swan (1981), 91 Ill. App. 3d. 856, 415 N.E.2d 1354.

Lastly, we have examined the record of the hearing before Judge Hill and we do

not find that he acted as a prosecutor. He acted as judge.

In closing, we hope that this distasteful matter is behind our fellow professionals, Judge Keenan and Attorney Stanton Ernest. Both are men of integrity, good character and good reputation.

The circuit court is affirmed.

AFFIRMED.

Judge Goldenhersh, concurs.

NO. 5-87-0660

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from
	)	the Circuit
Plaintiff-Appellee,	)	Court of
	)	Wabash County
vs.	)	
	)	No. 86-P-11
STANTON D. ERNEST,	)	Honorable
	)	Robert S.
Defendant-Appellant.	)	Hill,

) Judge
) Presiding.

JUSTICE HARRISON, dissenting.

I agree with the majority that a judge presiding at a trial should not testify as a witness at that trial. Although the majority cites no authority for this proposition, I believe that it is implicit in section 2-1001(a)(1) of the Code of Civil Procedure (Ill.Rev.Stat.1987, ch.110, par.2-1001(a)(1)), which provides, in part, that a change of venue may be had in a civil action where the judge's testimony is material to either of the parties to the action.

In the matter before us here, however, the judge was not being called as a witness. He was subpoenaed solely for the purpose of taking his deposition as

part of the discovery under-taken by defendant on behalf of his clients. Because discovery may include not only what is admissible at trial, but also that which leads to what is admissible (United Nuclear Corporation v. Energy Conversion Devices (1982), 110 Ill.App.3d 88,104, 441 N.E. 2d 1163,1174), having the judge submit to a deposition would not necessarily have resulted in his later being subject to call as a witness at the actual trial and, therefore, having to remove himself from the case.

A party's right to conduct depositions is not, of course, absolute. Supreme Court Rule 202 (107 Ill.Id R.202), which deals with discovery through depositions, must be viewed in conjunction with Supreme Court Rule 201

(107 Ill.2d R.201), which empowers the courts to deny, limit, condition and regulate discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression. (People ex rel. Illinois State Dental Society v. Norris (1979), 79 Ill.App.3d 890,901, 398 N.E.2d 1163,1172.) The majority here suggests that it is somehow inherently embarrassing for a trial judge to have to submit to a deposition in a case over which he is presiding. Under its approach, the trial judge in a case could never be deposed as part of that case. In effect, the trial judge would be placed beyond the reach of discovery, regardless of the circumstances. There is no basis for this position. To the contrary, it is flatly inconsistent with

Supreme Court Rule 202 (107 Ill.2d R.202), which expressly states that "[a]ny party may take the testimony of party or person by deposition ***." (Emphasis supplied.)

There is nothing in this record to indicate that defendant acted other than in good faith when he requested that the clerk issue the subpoena for the judge's deposition. His only concern appears to have been obtaining information about developments in the case which he believed to be highly irregular and possibly fraudulent. I fail to see how this would tend to obstruct the court in its administration of justice or derogate from its authority and dignity in any way. Defendant here did nothing to bring the administration of justice into disrepute, nor did he disobey any

court order or judgment. The prior order of the court merely denied defendant's motion for change of venue under section 2-1001(a)(1) of the Code of Civil Procedure (Ill.Rev. Stat.1987, ch.110, par.2-1001(a)(1)); it did not prohibit defendant from requesting that the clerk issue a subpoena so that he could take the judge's deposition. If the judge did not think that issuance of the subpoena was proper, what he should have done is simply order that the subpoena be quashed, leaving defendant to pursue the matter on appeal if he so chose.

There is no justification this record for holding defendant in contempt. I would therefore reverse.

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, ILLINOIS

IN THE MATTER OF THE	)	
	)	
ESTATE OF	)	NO. 86-P-11
	)	
MERILL H. WRIGHT,	)	
	)	
Deceased.	)	

MEMORANDUM OF OPINION

Cause comes on to be heard on the Motion for new trial filed by Stanton D. Ernest pro se. Argument was heard on the matter by Mr. Ernest in his own behalf without further participation in the proceeding.

Mr. Ernest made extended argument on behalf of his Motion for new trial. In his oral statement he referred to certain factual masters which were not dealt with in the new trial Motion and neither had the Court heard any evidence on these matters. Inasmuch as there was

no evidentiary basis for these arguments, the court does not give any consideration to these contentions.

It is contended by Mr. Ernest that certain of his Constitutional rights were deprived in the procedures followed in this case. He further contends that Judge Robert Keenan should have disqualified himself on the Motion for change of venue filed by attorney Ernest on behalf of his clients in this cause. In support of this, attorney Ernest argues that a Motion filed by other counsel in this case, which was accompanied by a purported letter, gives further legal reasons why Mr. Ernest's parties' Motion for change of venue should have been allowed. Mr. Ernest has stated in substance in the course of this argument that he feels strongly

about this case, that he has been profoundly affected personally by this proceeding, and that, of necessity, he will henceforth and forward always apply for a change of venue from Judge Keenan and that Mr. Ernest will continue to press forward with respect to his contentions about the propriety of the action taken by Judge Keenan in all forums, disciplinary or otherwise, in which the matter can be presented. Mr. Ernest further argued that, although he was personally apprised of what is alleged to be the information set forth in the letter previously mentioned in this opinion, he did not bring this information forward out of respect for Judge Keenan's judicial capacity.

This Court may take judicial notice of the files and records in this cause.

Accordingly, it is able to have reference to and does refer to the Motion above referred to with the letter attached and the transcript of the hearing on March 24, 1987, on change of venue.

In this proceeding, Judge Robert Keenan had entered an Order for distribution, which Order passed upon the merits of this request as raised by a Petition. Mr. Ernest, on behalf of his clients, has petitioned the Court to reopen this estate to permit reconsideration of this Order entered by Judge Keenan. Of necessity, if Judge Keenan were to consider the matters of Mr. Ernest's clients' requests, he would already have passed upon many substantial matters in the proceeding.

In this contempt proceeding, the

undersigned Judge does not believe that it is appropriate for him to consider the Motions for change of venue previously heard and denied by Judge Keenan. This case is not assigned for that purpose, and it is further not desirable for other Judges, under this consideration, to reconsider prior actions by other Judges in the same case. Furthermore, whether or not these Motions for change of venue were providently denied does not directly concern the merits of this contempt proceeding, but the transcript of the change of venue hearing does serve to advise of the judicial milieu of Mr. Ernest's subsequent conduct.

It is contended by Mr. Ernest that he has been denied the right to confront his accusers. In this case, it is

necessary to refer to conduct which this Court believes should properly be considered as direct criminal contempt. As the Court has heretofore indicated, this is being considered as a criminal contempt out of the nature of the proceeding and punishment which appears to demonstrate a punitive rather than a coercive purpose. The Court believes that this type of conduct should be regarded as criminal contempt and that this description most fully protects the rights of Mr. Ernest.

Direct contempt, whether civil or criminal, occurs within the ocular presence and knowledge of the Judge, therefore, no evidence needs to be taken since the Judge has heard and seen all of the necessary elements to make a finding of contempt. In

direct contempt, the respondent has no due process rights except to make a statement in allocution prior to sanctions being imposed, whereas in an indirect contempt proceeding, the respondent is entitled to the full due process rights of one charged with civil or criminal contempt. Following are exceptions to the rule that all elements of a direct contempt must occur within the ocular presence of the Court:

1. Filing a spruous will with the Clerk of the Court. In re Estate of Kelly, 365 Ill. 174, 6 N.E. 2d 113 (1936).

2. Filing documents contrary to the Court's order. People v. Andalman, 346 Ill. 149, 178 N.E. 412 (1931).

3. Refusing to answer questions before the Grand Jury. People v. Cochrane, 307 Ill. 126, 138 N.E. 291 (1923).

4. Filing scurrilous pleadings. People ex rel. Kunce v. Hogan, 62 Ill. 2d 55,

364 N.E. 2d 50, 7 Ill. Dec. 63 (1977)

From the foregoing, the Court concludes that the elements of this case are sufficiently within those exceptions of the Rule based on action having to do with filings specfically in this case having to do with the issuance of subpoena for Judge Robert Keenan. This Judge came to know about the circumstances by reason of the action of Judge Robert Keenan in commencing an action for Rule and also in the course of the transcript of proceedings before Judge Keenan, which was brought to the Court by the alleged contemnor.

Contumacious conduct constitutes direct criminal contempt if it is committed in such a manner that no evidentiary hearing is necessary to determine the facts surrounding such

conduct, and is committed in an integral part of the Court while the Court is performing its judicial function. In other words, it is an act which takes place in the very presence of the Judge with all the elements of the contempt being within the personal knowledge of the Judge. United States v. Wilson, 421 U.S. 309 44 L. Ed. 2d 186; People v. Jashunsky, 51 Ill. 2d 220, 282 N.E. 2d 1 (1972).

Due to the summary nature of direct criminal contempt, a contemnor is not entitled to the usual due process rights of one charged with a criminal offense. He has no right to notice, a written charge, counsel, jury trial, by evidentiary hearing, or cross examination of witnesses -- (only the right to make a statement in allocution

prior to sanctions being imposed. People v. Siegal, 400 Ill. 208, 79 N.E. 2d 616 (1948).

In a direct criminal contempt proceeding, the respondent has no right to a substitution of Judge. McAdams v. Smith, 25 Ill. App. 2d 237, 116 N.E. 2d 446 (1986); People vs. Parker, 397 111. 305, 74 N.E. 2d 523 (1947).

However, if the Judge is the target of personal attacks and takes no immediate summary action by finding the contemnor in direct criminal contempt, due process requires that the hearing be conducted before another Judge. Mayberry v. Pennsylvania, 400 U.S. 455, 27 L. Ed. 2d 532, (1971). In this event the pertinent part of the transcript is presented to the Judge hearing the contempt proceeding. The Judge before

whom the contempt occurred need not testify in the contempt proceedings since an adjudication of contempt is based solely on the record. See also Taylor v. Hayes, 418 U.S. 488, 41 L. Ed. 97 (1974). Although the Judge before whom the contempt occurred may sanction if he acts immediately, he should refer the matter to another Judge if his conduct was so integrated with the contempt that he contributed to it or was otherwise involved or his objectivity can reasonably be questioned. Offutt v. U.S., 348 U.S. 11, 99 L.Ed. 11 (1954).

Since a direct criminal contempt proceeding is suumary in nature, there is no hearing in the general sense of the word. However, prior to the finding of direct criminal contempt, the Court

must inform the contemnor of the specific contemptuous conduct and before sanctions are imposed, must allow the respondent to give a statement in mitigation. These have been allowed here.

In a direct criminal contempt action, a specific showing of intent is required but may be inferred from the contemptuous conduct itself. People ex rel. Kunce v. Hogan, 67 Ill. 2d 55, 364 N.E. 2d 50 (1977); People v. Sheahan, 150 Ill. App. 3d 572, 502 N.E. 2d 48 (1987).

In light of the assertions of Mr. Ernest in his argument for a new trial, the Court has reconsidered his findings with respect to the behavior found to be contemptuous. The Court further finds that the proceedings in which the

conduct occurred were pursuant to Mr. Ernest's clients' request to re-open the estate. This is not an occasion for discovery in the usual sense. Therefore, Mr. Ernest's claim of right to go forward with discovery has little merit. Next, discovery is not a proper vehicle to prepare a bystander's report of proceedings. Finally, the suspicion, without more, that improper matters constituting fraud occurred on the occasion of approval of the Final Report, or the unfounded suspicion that the Court may have acted in some way worthy of inquiry or discipline do not provide a basis for discovery requiring the Court to give discovery deposition this cause.

In any case, the announcement by Judge Keenan (report of proceedings of

March 24, 1987 p. 22) "I don't believe that it would be proper in this case for a Judge in this situation..." amply protected the rights of Mr. Ernest's clients. He might have applied for permission to issue the subpoena and to take the deposition if he felt that some further ruling was necessary. Nevertheless, he pressed on under claim of right without citation or authority or giving the Court an opportunity to reconsider.

Ernest's action compelled Judge Keenan to act or risk a claim of contempt against himself. This served to embarrass and to derogate from the Court's authority. By use of the peremptory process of subpoena (the process of the Court itself) under claim of absolute right, after the Court had

previously found it to be inappropriate, the Court was obliged to act to quash the process or to disregard its own process as void. Alternatively, he would have been obliged to submit voluntarily to the investigative process of attorney Ernest as to what he recalled about a proceeding before the Judge, to be used in some way in a hearing to be held before Judge Keenan himself (by virtue of the then denied Motion for change to venue.)

The Motion for new trial is denied.

In considering the Motion for new trial, the Court has understood the position of the alleged contemnor with respect to the seriousness of his position. It is not, however, believed to be appropriate to assert expected actions in various other ways, in order

to secure the serious consideration of a party. The Court has given the most serious and full consideration to the points raised in the written Motion for new trial. The Court has specifically inquired for citations of authority on these points but has been provided with none. Under the authorities known to the Court, the new trial request is denied.

/s/ Robert S. Hill

JUDGE PRESIDING

DATE: August 31, 1987

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, ILLINOIS

IN THE MATTER OF	)	
	)	
THE ESTATE OF	)	NO. 86-P-11
	)	
MERRILL H. WRIGHT,	)	
	)	
DECEASED.	)	

OPINION

A citation for contempt has issued at the order of Judge Robert Keenan against Stanton D. Ernest. This proceeding has come on before the court only insofar as the citation for contempt is concerned. The court has before it the transcript of the proceeding, when the court discussed the issuance of a rule to show cause, the rule signed by the judge, and the evidence presented by the defendant in contempt.

Reference has been made to the

facts in memorandun submitted on behalf of Mr. Ernest, and the court will not undertake a full statement of the facts.

It appears that thirty days after the court approved a final account and report and authorized distribution, certain of the named beneficiaries, represented by Mr. Ernest, filed a request to reopen the estate, to which request various amendments have been made. As has been pointed out, the court ordered the estate to be closed upon the filing of receipts of distribution, but those receipts have not been filed. Among contentions of the parties represented by Mr. Ernest is the claim that they received no notice of the final accounting, or of the hearing on the final account and proposed distribution. Thereafter, on

behalf of his clients, Mr. Ernest filed a motion for change of venue from Judge Keenan, based upon the contention that Judge Keenan was witness and, therefore, should be disqualified. The statute provides that when a judge is a material witness, a change of venue should be allowed.

Among other things, it is contended by Mr. Ernest that Judge Keenan is a material witness, or that he may be such. In essence Mr. Ernest contends that Judge Keenan entered an order approving the final report and distribution, which was erroneous based on Mr. Ernest's analysis of Judge Keenan's conduct in other cases, he has come to the conclusion that Judge Keenan is normally exceedingly cautious in uncontested matters and that, in this

case, he would not have entered this order, unless he had been influenced, somehow, to do so by evidence or information that was provided to Judge Keenan.

There is no reporter's transcript of the particular hearing, but Mr. Ernest was not there. From ought that appears, Mr. Ernest is not informed about anything which did take place, to which Judge Keenan was a witness.

Judge Keenan denied the motion for change of venue, on the basis that he was not convinced that he was in any manner a material witness to the controversy. The propriety of Judge Keenan's ruling is not before me. There is no question that this request was properly presented to Judge Keenan and heard by him.

Thereafter, Mr. Ernest caused a subpoena to be issued for service on Judge Keenan for the purpose of taking his discovery deposition. It is now claimed that the purpose of this deposition was to ascertain if any evidence or information was conveyed to Judge Keenan prior to his ruling on the final report and, if there was none, a purpose was to ascertain that there was, indeed, no evidence (a fact which Mr. Ernest expects to use Judge Keenan's testinony to establish).

At this point, the court has not received, nor does he have before him, a transcript of all the proceedings after the rule to show cause was issued. Therefore, what the court is about to say, is not intended to contradict any ruling that may have been made in other

particulars but, instead, these findings relate to this particular proceeding for contempt, to which the parties are the People and Ernest. The Circuit Court of the Second Judicial Circuit has jurisdiction over the Matter of the Estate of Merrill Wright, No. 86-P-11. This estate has never been closed, for at least two reasons, one of which is that no receipts were filed in compliance with the court's order, and, second, that, if the order for distribution were somehow considered to be closing of the estate, a further request was made on behalf of these parties within thirty days, while the court still had jurisdiction. Furthermore, even if the estate was somehow considered to be closed, the parties have continued to take discovery

and litigate in numerous other particulars without any order reopening the estate. Thus, the parties have voluntarily revested the court with jurisdiction, if the court had lost jurisdiction.

It seems likely that further proceedings will be necessary or desirable in this estate, by reason of the distribution which has been proposed, without notice to the parties represented by Mr. Ernest and others.

It is uncontestably true that a judge might become a witness to material facts growing out of hearings which took place before him. Without undertaking to suggest all possible circumstances, a judge could be a witness to something which would be a fact in some other case and this testimony might be the only way

of bringing that fact forward. Obviously, a judge could be a witness to an occurrence and could be called, like any other witness.

In this case, however, for purposes of this case, the question about what happened before Judge Keenan is material only for the purpose of a record, from which record the propriety of the judge's action may be raised. It appears to be Mr. Ernest's theory that the recollection of the judge, as to the occurrences in court before him, makes a record from which an appeal or other ancilliary action could be taken in the absence of a reporter's record of the proceedings. This is not correct. For purposes of appeal, the judge's recollection, written up by the judge, has no utility, and the record, if one

were to be made under those circumstances, would be a bystander's report of proceedings and could be arrived at only in the way such a report of proceedings could be established. (See Lofendo v. Ozog, 118 Ill.App 3d 237, 73 Ill. Dec.709, 713.)

Since Mr. Ernest has no direct informaticn, which has been brought forward in this proceeding, about facts to which Judge Keenan's testimony would be useful, at this point it is purely speculative that Judge Keenan would be required as a witness. Until we arrive at the point that Judge Keenan is required as a witness, then a change of venue is not aoprpriate, although, the judge could recuse himself, if he wished to do so.

Under Mr. Ernest's theory, a change

of venue could be sought from any judge, if there were some proceeding which had taken place before him, which was not fully reported. Furthermore, Mr. Ernest contends that there may have been things which did not take place in court which influenced the judgment arrived at by the court. Surely, the suspicion of counsel that the judge might have been improperly influenced does not provide a basis for taking discovery deposition of the judge to satisfy this curiosity.

A full and extremely competent argument has been made on behalf of Attorney Ernest, where it is contended that Mr. Ernest's action, in having the subpoena issued to take a discovery deposition of the judge, is "good faith pursuit of his client's interest." The rules governing contempt in the State of

Illinois, where attorneys are involved, are not satisfied by good faiths. It may seem somewhat heroic on behalf of a client to beard the judicial lion in his den, or to bell the judicial cat. Such action must be weighed in light of the duties cf the attorney who is to represent his client but must, also, serve as an officer of the court.

It is not unheard of in Illinois, for lawyers to place themselves in contempt of court, as a method of raising a point for review. It would seem, however, that a system which would require a lawyer to risk serious penalties, including even the possibility of imprisonment, in order to represent his client properly, should be improved. In this case, the court had berore it the question of the propriety

of its order approving the final report and ordering distribution. This question should be presented before the same judge who had originally made the order, since he would be best informed about the arguments or information which led to his entry of the order. Therefore, Judge Keenan was the judge before whom any request to set aside or change his order of distribution should have been presented. After the change of venue had been disposed, Mr. Ernest pressed on for the purpose of obtaining information which would show that the judge was a material witness, or had been improperly influenced, or any other matter which would require his disqualification as a judge. It is necessary to bear in mind, at this point, that the change of venue is no

longer pending; but, as I understand it, Mr. Ernest claims the right to continue discovery from the judge against the chance that he might be able to find some information which would result in the disqualification of the judge.

In direct criminal conduct in Illinois, a specific showing of intent is not required. People, ex rel. Kunce v. Hogan, 67 Ill.2d 55, 364 N.E.2d 50, 1977. In this case, the Supreme Court reversed the Appellate Court where an attorney in the service of his client sued the judge, about a case which was still pending before the judge. The attorney was held in contempt, fined, and ordered imprisoned. The imprisonment was eventually discharged. The arguments presented on behalf of Attorney Hogan resemble considerably the

arguments which are made here, except that it is here contended that the broad rules of the Supreme Court allowing discovery extend over to permit taking discovery depositions of the judge in a case in which he continues to preside for the purpose of bringing into question the propriety of the judge's action, legally or ethically.

I am unable to see how a suspicion based upon prior good conduct provides a basis for taking the discovery evidence of a judge, in order to see if, or how, he misconducted himself in arriving at a decision, the propriety of which is still in question before him.

Mr. Ernest has an obligation not to embarrass the judicial process, and balancing this against the privilege (if any) of discovery on a matter which has

already been determined favors the former. It would have been inappropriate for Judge Keenan to disregard the process of subpoena and to refuse to come by his own private decision. It was proper for him to strike the subpoena rather than to invite an acton in contempt against himself. Having done so, he initiated this rule and asked that it be heard by another judge. Procedurally, this is impeccable. See Mayberry v. Pennsylvania, 400 U.S 455, 2, L.Ed.532.

Thus, in People, ex rel. Kunce v. Hogan 67 Ill.2d 55, 364 N.E.2d 50, 52: "Contrary to the holding of the appellate court, the failure of the prosecution to affirmatively prove the state of mind of the defendant is not fatal. In Kneisel v. Ursus Motor Co.

(1925) 316 Ill.36, 147 N.E.243, a person, without having obtained leave of court, filed a petition in the circuit court of Cook County in a pending case involving certain assets of a receiver who had been removed by the court. On review, this court stated that if the conduct constituted contempt it was direct contempt and stated: 'Whether such a contempt has been committed depends upon the act and not the alleged intention of the offending party.' 316 Ill. 336, 342, 147 N.E.243, 245."

The conduct of Mr. Ernest is sufficiently embarrassing and disruptive as to constitute a contempt of court, and this court finds the defendant in contempt. A hearing with respect to proper punishment is required and the court proposes June 16, 1987, at 10:30

a.m. as a time for this additional proceeding.

/s/ Robert S. Hill

Circuit Judge

Supreme Court, U.S.
FILED
APR 26 1991
OFFICE OF THE CLERK

No. 90-1428

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STANTON D. ERNEST,

Petitioner

versus

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

PETITIONER'S SUPPLEMENTAL BRIEF

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No. 90-1428

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STANTON D. ERNEST,

Petitioner

versus

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

On Writ of Certiorari to the

Supreme Court of Illinois

PETITIONER'S SUPPLEMENTAL BRIEF TO

PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The Court should be aware that the state of Illinois has proceeded rapidly to punish petitioner Stanton Ernest beyond a mere $50 fine for criminal contempt. The state is proceeding to sanction him for violation of the

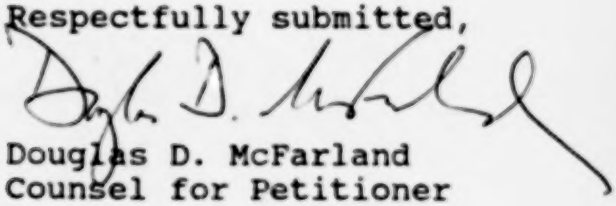
Illinois Code of Professional Responsibility.

A senior attorney for the Attorney Registration and Disciplinary Commission, William F. Moran III, Esq., wrote to Ernest this spring, noting the affirmance of his criminal contempt conviction and raising the possibility of professional discipline. Ernest responded by letter and telephone. Ernest specifically pointed out that he was seeking certiorari from this Court. The very same day that he received Ernest's response, Moran referred the matter on to the Inquiry Board, which is the next step of the disciplinary process. The matter temporarily rests there today.

Ernest respectfully renews his request to this Court to grant a writ of certiorari, or even to act summarily, as this Court has done previously in the cases cited in the Petition For Certiorari.

DATED: April 26, 1991.

Respectfully submitted,



Douglas D. McFarland
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JUN 26 1991
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(3)

No. 90-1428

In The

Supreme Court of the United States

October Term, 1990

STANTON D. ERNEST,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should deny the writ where the Illinois courts properly found that petitioner's actions disparaged the authority and dignity of the trial court?

2. Whether petitioner was afforded sufficient due process at his contempt hearing?

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In The

Supreme Court of the United States

October Term, 1990

STANTON D. ERNEST,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

Respondent respectfully suggests that this Court disregard petitioner's statement of the case. First of all, Petitioner does not cite to the record. Secondly, petitioner

refers to facts outside the record, specifically page 9, first full paragraph of the petition for writ of certiorari. And finally, petitioner's statement is argumentative.

This appeal of a finding of contempt arose out of proceedings to administer and settle an estate. On October 8, 1986, the Circuit Court of Wabash County, Illinois, Judge Robert M. Keenan, Jr. presiding, issued an order approving a final accounting and authorized distribution of the estate's assets. (R. C397-401). Subsequently, several named beneficiaries retained petitioner Stanton D. Ernest as their attorney. Ernest filed a petition to reopen the estate alleging, among other things, that final distribution had been wrongfully ordered without notice to all interested parties.

The petition requested that the October 8, 1986 Order Approving The Final Report and Inventory be vacated. (R. C422-25). Defendant filed a First Amended Petition to Reopen the Estate, which expanded the grounds for relief. (R. C427-441).

The October 8, 1986 Order stated that upon the filing of receipts of distribution by the Executor that the estate would be fully settled and closed. (R. C398). At the time of the contempt citation at issue on this appeal, receipts of distribution had not been filed (R. C88) and, therefore, the Estate had not legally closed. (R. C90).

On March 17, 1987, Ernest filed a Motion for Change of Venue ("the Motion") (R. C10). The grounds upon which petitioner asserted the Motion included that the testimony of the presiding judge, Robert M. Keenan, Jr., was "material and critical to [his client's] cause for impeachment purposes and furthermore, to determine

whether or not the Order of October 8, 1986, was obtained by fraud." (R. C12, C193). The Motion stated that petitioner wished to depose Judge Keenan and call him as a witness to testify as to what evidence was presented and what otherwise happened at the October 8, 1986 hearing. (R. C12, C197). There was no court reporter at the October 8, 1986 hearing, and, therefore, no transcript of the proceedings was available. (R. C197).

Judge Keenan denied the Motion on two grounds. First, petitioner's First Amended Petition had not alleged fraud in the October 8, 1986 Order, and, therefore, the judge's testimony as to what occurred at the October 8, 1986 hearing was not material to an issue in the case, as required by the venue statute. (R. C212.1). Thus, the only issue alleged as to the October 8, 1986 Order was one of proper notice to all parties. (R. C199, C212.1). Second, petitioner had presented no authority – and the judge personally knew of no authority – authorizing a party to call a judge to testify as to matters which were then being heard by him, and which he learned solely as a result of being the judge on the case. (R. C210). The judge stressed that permitting a litigant to call as a witness the judge who was presiding over a matter could lead to disqualification in almost every case, because a party might call a judge to testify whenever a dispute arose about events occurring in the courtroom. (R. C211).

The judge went on to explain, however, that, in any event, his testimony as to what occurred during the October 8, 1986 hearing would not be material to petitioner's clients' claim as to notice because, as the Court had previously stated, the docket entry from October 8, 1986 gave no indication that any evidence had been presented.

Rather, the judge indicated it stated that "executor and counsel appeared, no objections filed, no objectors present. Account examined and approved per written order signed and filed." (R. C198-99, 212.1). Thus, the judge was effectively ruling that he had no testimony to offer, in any event. In fact, Judge Keenan later explicitly stated exactly this in his Order of Recusal dated October 9, 1987: "I can provide no information about any events in court on October 8, 1986, except what I have read from the docket sheet, the Clerk's daily sheet and my own record book. I have no independent memory of the events of that day." (R. C180).

Judge Keenan concluded his denial of the motion, stating that he thought it would be improper for either of the parties in the case to issue a subpoena for the judge to testify unless they brought appellate authority to the judge in support of such a proposition. (R. C212.2).

On March 25, 1987, in blatant disregard of Judge Keenan's ruling of the previous day, petitioner had a deposition subpoena issued to him. (R. C29). Petitioner did not file a renewed motion for change of venue or memorandum of law citing authority which would authorize this action as the judge had demanded and which would have allowed the judge to reconsider his decision. (R. C133).

Judge Keenan ordered petitioner to appear before him at a hearing held later on March 25, 1987. (R. C187). At the hearing, Judge Keenan reiterated that his basis for denying the Motion had been that no authority had been provided authorizing a party to ask for testimony from a judge who was sitting in the case. In response to Judge

Keenan's questions, petitioner admitted he was aware of the basis for the court's ruling on the substitution motion. (R. C188). Petitioner stated that he understood this and that he had requested the subpoena anyway. (R. C189). The judge stressed that petitioner's action was "directly contrary to both the spirit and intent" of his ruling on the motion and offered petitioner the opportunity to withdraw the motion or be cited for contempt. (R. C189). Petitioner refused and the judge ordered a formal contempt citation to be issued. (R. 185). Petitioner did not request leave to cite authority or attempt to present authority at any time.

At this juncture, the judge emphasized that there were a number of alternatives to petitioner's actions which could have resolved this disputed issue. Specifically, the judge stressed that petitioner could have requested a Illinois Supreme Court Rule 308 finding authorizing an interlocutory appeal of the judge's denial of the Motion. (R. C189). The judge stressed that petitioner's failure to do so indicated that his purpose in subpoenaing the judge "was not to find out what the law is from a higher court, but merely to embarrass and hinder the court and that's the basis of the contempt citation." (R. C189-90). Judge Keenan quashed the subpoena and then referred the case for assignment to another judge to handle the matters arising from the contempt citation. (R. C190).

Judge Keenan issued Findings and an Order to Show Cause. (R. C35).

The order charged petitioner with committing a contumacious act in derogation of the court's authority. The

order recited the relevant events. (R. C37-38). Judge Robert S. Hill held a hearing on the Order to Show Cause why petitioner should not be held in contempt. (R. C214-287). At the hearing petitioner presented testimony explaining his actions in having the subpoena issued. (R. C245-273). There was no prosecutor to present a case against petitioner. (R. C218). Judge Hill stressed throughout petitioner's contempt proceeding that he was not acting as a prosecutor. (R. C218-19, C293). Judge Hill stated that the proceedings were in the nature of a response by petitioner to Judge Keenan's Order to Show Cause. (R. C218). Judge Hill did propound questions to petitioner, but stated that they were not for the purpose of cross-examination. (R. C259). Judge Hill asked petitioner questions concerning his understanding of Petitions to Reopen an Estate and his understanding of whether the *Estate of Merril H. Wright* was closed or had reopened. (R. C262-273). Judge Hill did not ask petitioner any questions concerning the Motion for Change of Venue, the subpoena issued to Judge Keenan, or the contempt citation hearing before Judge Keenan.

On May 26, 1987, Judge Hill issued an opinion finding that petitioner's conduct had been sufficiently embarrassing and disruptive as to constitute a contempt of court. (R. C88-95).

Although Judge Hill did not review Judge Keenan's denial of the motion, he supported Judge Keenan's decision, stating that Petitioner had brought forward no facts, beyond speculation, which indicated Judge Keenan would be a material witness in the case. (R. C92). Judge Hill stated that until Judge Keenan's testimony became required, a change of venue would not be appropriate. (R.

C92). Judge Hill concluded that he was unable to see how the suspicion of counsel, without more, that a judge had been improperly influenced, or otherwise misconducted himself, provided the basis for taking a discovery deposition of that judge "in order to see if, or how, he misconducted himself in arriving at a decision, the propriety of which is still in question before him." (R. C92, C94).

Judge Hill then stated that it would have been inappropriate for Judge Keenan to disregard the subpoena and simply to refuse to attend. Therefore, it was proper to quash the subpoena, "rather than to invite an action in contempt against himself." (R. C95).

Judge Hill held a sentencing hearing on June 15, 1987, to allow petitioner to present evidence mitigating the punishment (R. C292), after which the judge fined petitioner $50.00. (R. C332). The judge summarized the proceedings to that point and noted that petitioner, instead of serving the subpoena, could have attempted an appeal from Judge Keenan's ruling. (R. C325-331).

Petitioner filed a Motion for a New Trial which Judge Hill denied. (R. C127-134). In this motion, petitioner alleged that "substantial authority exists for the proposition that the judge in a case can be properly called as a witness in the same case in which he is presiding to testify as to matters he learned of while sitting as a judge in the case." (R. C101). Despite this claim, petitioner cited no such authorities in the motion. (R. C134). In a memorandum opinion, Judge Hill stressed, however, that the propriety of Judge Keenan's denial of petitioner's Motion for Change of Venue was never before him. (R. C129). Furthermore, he noted that the propriety of the denial of

the Motion had no bearing on the merits of the contempt proceeding. (R. C129).

Petitioner also raised a federal constitutional confrontation clause claim and fourteenth amendment due process clause claim alleging that no independent prosecutor prosecuted the contempt citation and that there was no witnesses against him. (R. C100-102). Rather, petitioner claimed that Judge Hill served as the prosecution of the contempt case. (R. C102).

The appellate court, with one justice dissenting, affirmed the circuit court's judgment. (*People v. Ernest*, 188 Ill. App. 3d 987) The court concluded that petitioner's conduct was contumacious. The court stated that a judge could not be a witness in a case in which he is presiding and that petitioner's actions in securing a subpoena tended to embarrass and obstruct the court in its administration of justice. The appellate court also rejected petitioner's contention that the contempt proceeding did not comport with due process, concluding the adequate procedures were employed at the hearing.

The Illinois Supreme Court granted Ernest's Petition for Leave to Appeal, and after briefing and argument affirmed the decisions of the lower court. The court held that

> We are aware that a defendant believed that issuance of the subpoena was required to preserve the issue for appeal and therefore was in the best interest of his clients.
>
> We do not believe that issuance of the subpoena was necessary, and we consider that defendant's actions overstepped the bounds of strenuous

> and persistent advocacy. In the motion for substitution of judge, defendant presented his clients' assertion that it was crucial that Judge Keenan testify concerning the October 8, 1986, hearing. Unlike the situation in *Holt*, therefore, the relevant issue had already been raised. Yet defendant did not request that Judge Keenan certify a question of law for an interlocutory appeal pursuant to Supreme Court Rule 308 (107 Ill.2d R. 308). Nor did defendant seek leave to cause a discovery subpoena to be issued to Judge Keenan, citing authority in favor of his request. Defendant instead placed himself in a posture directly contrary to Judge Keenan's ruling, in an inappropriate attempt to trigger the procedural mechanism for its review.

People v. Ernest, No. 69318 (May 10, 1990). The court went on to hold that the contempt hearing satisfied the requirements of due process.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS PROPERLY FOUND THAT PETITIONER'S ACTIONS DISPARAGED THE AUTHORITY AND DIGNITY OF THE COURT

Petitioner claims that he subpoenaed the trial court judge in this case in a good faith effort to protect the interests of his clients and thus a finding of contempt conflicts with the decisional law of this court. Petitioner further alleges that his actions were not directly contrary to the court's order and that therefore his actions were not contumacious. Respondent answers that the Illinois courts properly found that petitioner disparaged the

authority and dignity of the court by disobeying a valid court order and that such finding was not in conflict with any decision of this Court. Respondent further maintains that petitioner's contention that the court's order was ambiguous is without merit where it is clear from the record that petitioner understood the implications of his actions and the intent of the judge.

Petitioner cites the cases of *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Little*, 404 U.S. 553, 555 (1972) and *In re McConnel*, 370 U.S. 230 (1962) for the proposition that a lawyer's good faith efforts to advance the interests of a client are protected so long as they do not pose an obstruction or imminent threat to the administration of justice. Respondent agrees with petitioner that these cases stand for the proposition stated, but maintains that the facts in the case at bar are inapposite.

Petitioner argues that, "Ernest's only act alleged to be contumacious was to request issuance of a subpoena from a court clerk. He violated no direct court order; no order not to issue a subpoena appears in the transcript of the hearing on the motion to change venue and no such order can be fairly implied from the language used by the court." Pet. at 25. Petitioner has substantially misstated the primary issue on appeal.

The record and opinions below make clear that the reason petitioner was cited for contempt was not simply that he filed the subpoena but rather that in spite of the judge's reasons for denying the motion for substitution of judges, petitioner had a deposition subpoena served on the judge. The record reveals that the judge's comments at least implicitly ordered the parties not to subpoena

him. Further, when the judge extended an opportunity to withdraw the subpoena and told petitioner if he did not he would be cited for contempt, petitioner said, "I won't withdraw it, so you might as well do that." *People v. Ernest*, 188 Ill. App. 3d 987, 544 N.E.2d 1275 (5th Dist. 1989).

Petitioner's allegations to the contrary, the act of having the subpoena issued was merely the event which precipitated the citation. It was the fact that the judge had already stated that he could not be a witness, followed by the fact that petitioner refused to withdraw the subpoena when ordered to do so that perfected the contemptuous act. Petitioner's current position that it cannot be fairly implied from the record that the parties had been ordered not to subpoena the judge cannot be reconciled with petitioner's own understanding of the judge's intent, or with the higher court's reading of the record.

Petitioner admitted that he understood the judge's ruling, and further understood that the judge was ordering him to withdraw the subpoena, therefore his argument that no such order can be implied from the record is specious. (R. C189). As the Illinois Supreme Court stated, "to allow defendant the ability to escape a contempt citation, when it is clear from the record that defendant understood the implications of his actions, merely because the order at first may have been ambiguous would significantly disparage the authority of the court." No. 69318 at 26.

Petitioner never attempted to assuage the court's concern that it was not permissible to call as a witness the

judge who was presiding over a matter, by citing authority for that proposition. A number of methods existed for petitioner to properly cite such authority. As the Illinois Supreme Court held, " . . . the relevant issue had already been raised. Yet defendant did not request that Judge Keenan certify a question of law for an interlocutory appeal pursuant to Supreme Court Rule 308 (107 Ill.2d R. 308). Nor did defendant seek leave to cause a discovery subpoena to be issued to Judge Keenan, citing authority in favor of his request. Defendant instead placed himself in a posture directly contrary to Judge Keenan's ruling, in an inappropriate attempt to trigger the procedure for its review." No. 69318 at A-31-32. Petitioner also could have filed a motion to reconsider or moved to supplement the motion for change of venue. Petitioner's failure to do so is made even more egregious by the fact that he ignored specific suggestions by the trial court as to how he could have avoided the contempt charge. When viewed in this light, it is apparent that petitioner's actions were not conducted in good faith but rather could and did constitute contempt of court. Petitioner's claim that he acted in good faith in order to preserve the issue for appeal must also fail because he could have achieved his objective without filing the subpoena or later refusing to withdraw it.

Petitioner's claim that he caused the subpoena to issue in good faith because he believed the judge may have had necessary information must also fail. As the appellate court held, "a judge cannot and should not be a witness in a case in which he is presiding. If a subpoena were obeyed, the judge would be forced off the case, giving the litigant a powerful, but illicit tool." *People v.*

Ernest, at A-47. Judge Hill, ruling on the contempt citation noted that he was unable to see how the suspicion of counsel, without more, that a judge had been improperly influenced, or otherwise misconducted himself, provided the basis for taking a discovery deposition of that judge "in order to see if, or how, he misconducted himself in arriving at a decision, the propriety of which is still in question before him." (R. C92, 94).

The cases petitioner cites in support of his position that the Illinois courts' finding of contempt is in conflict with the law of this Court do not aid petitioner. In each of these cases, the court found that the contemnor had not committed a contumacious act based on the facts of that particular case. In *Holt*, for example, the findings of contempt were reversed after this Court explicitly noted that the petitioners were not charged with violating a valid court order. Such is not the case here.

While the judge did not directly "order" petitioner not to subpoena him, the court unequivocally stated that absent authority, it did not believe that it was appropriate for either party to cause a subpoena to issue. (R. C210). Further, prior to holding petitioner in contempt, the judge stressed that petitioner's action was contrary to both the spirit and the intent of his ruling. Petitioner clearly stated that he was aware of the basis of the court's order but had requested the subpoena anyway. (R. C189). Petitioner cannot now claim that he misunderstood the court's intent or argue that his actions were not contumacious because the judge did not specifically say that if one of the parties issued a subpoena he would be held in contempt.

Even assuming *arguendo,* that both the petitioner's and the court's clear statements can be interpreted another way, the act of causing the subpoena to issue was merely the event which precipitated the citation' as shown above. It was the fact that even after the judge had stated he could not be called as a witness, petitioner refused to withdraw the subpoena when *directed to do so* that perfected the contemptuous act.

Petitioner's contention that an attorney must be free to advocate the interests of his client is correct but is not relevant in this case. Petitioner's argument that he acted in the only manner possible in order to present the requested authority to the judge and/or perfect an appeal is ill-advised in light of the fact that other options were not only available, but were specifically delineated by the trial court.

II.

PETITIONER WAS AFFORDED SUFFICIENT DUE PROCESS AT HIS CONTEMPT HEARING

(Response to Petitioner's Issue Two & Three)

Petitioner complains that the contempt proceedings below failed to afford him due process of law. First, petitioner suggests that he was entitled to a formal criminal trial. Second, petitioner assails the lack of a prosecutor at his hearing and asserts that Judge Hill undertook a prosecutorial role. Third, petitioner argues that the failure of Judge Keenan to testify denied him his right of confrontation. Finally, petitioner implies, without argument,

that the State failed to meet its burden of proof. For the reasons below, these claims are wholly without merit.

The Illinois Supreme Court found that because Judge Keenan referred the contempt matter to another judge, the charge was in the nature of an indirect as opposed to a direct contempt. *People v. Ernest* at A-35. In an indirect criminal contempt prosecution, the appropriate standard is one of fundamental fairness, rather than the application of provisions of the Bill of Rights to contempt prosecutions as "crimes." *United States v. Bukowski*, 435 F.2d 1094 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1970).

Fundamental fairness requires only that petitioner be given notice, opportunity to answer, and a hearing. *People v. L.A.S.*, 111 Ill.2d 539, 544, 490 N.E.2d 1271, 1273 (1986). Contempt of Court is a petty offense, and a contemnor is not generally entitled to a trial by jury, unless the contempt is statutorily punishable or actually punishable by a term of imprisonment greater than six months. *Taylor v. Hayes*, 418 U.S. 488, 495 (1974).

In this case, Judge Keenan issued an Order to Show Cause that specified that he based petitioner's contempt citation on petitioner's issuance of the deposition subpoena despite the court's denial of the Motion for Change of Venue and the specific "holding" that it would not be proper to call the sitting judge as a witness under the circumstances of the case. (R. C35-38). The Order to show Cause further specified that a hearing would be held to enable the petitioner to answer and respond to the charge. (R. C38). Thereafter, a hearing was held before Judge Robert S. Hill. (R. C214-287). Petitioner was represented by counsel at the hearing. (R. C216). Petitioner

called witnesses to testify in his behalf, and he testified himself. (R. C32, C61). Under such circumstances, there can be no question that petitioner received the notice and opportunity to be heard required by fundamental fairness.

As noted above, the applicable standard under the fourteenth amendment in contempt cases is fundamental fairness, rather than the specific due process requirements of the fifth and sixth amendments. *Bukowski* at 1094. Thus petitioner has no specific right to confront the witnesses against him.

Under Illinois law, which consistently follows the law as established by this Court, petitioner's due process rights were sufficiently protected. In *People v. Winchell*, 45 Ill. App. 3d 752, 359 N.E.2d 487 (3rd Dist. 1977), the hearing was fundamentally fair although the contemnor was uncounseled, did not present evidence on his own behalf, did not cross-examine any witnesses, and did not ask for a continuance to prepare a defense. Likewise, in *Armentrout v. Dondanville*, 67 Ill. App. 3d 1021, 385 N.E.2d 829 (2d Dist. 1979), the hearing was fundamentally fair although *both* the contemnor and the State declined the judge's offer to present evidence and call witnesses, and the finding of contempt rested on the pleadings and memoranda submitted by the parties. In both cases, as here, the contemnor was familiar with the facts and was given the opportunity to explain himself and to challenge the procedure employed.

Petitioner urges that Judge Hill undertook a prosecutorial role at the hearing. This is simply not true. Judge Hill stressed throughout the proceedings that he

was not acting as the prosecutor. (R. C5-6, C293). He did, however, ask petitioner questions in order to clarify petitioner's, as well as his own, understanding of the circumstances of this case. Under Illinois law, the court may properly question to elicit truth or clarify an issue. *People v. Ernest* at A-38 citing *People v. Wesley*, 18 Ill.2d 138, 155 (1959). Petitioner has cited no case law which would indicate that the role the judge took in these proceedings was prosecutorial. In any event, he could not because Judge Hill did not do so.

Petitioner's claim that he was denied the right to confront the witnesses against him must also be rejected. The Illinois Supreme Court held that petitioner's conduct was a matter of record which petitioner did not deny. Therefore, no witnesses were necessary to establish the contempt. *Ernest* at A-39.

Finally, petitioner argues that the State failed to meet its burden of proof. The fact of the matter is, however, that the record and transcripts of all the proceedings, of which the court was authorized to take judicial notice, were before Judge Hill. *Ernest* at A-37. It is apparent from the nature of petitioner's act that Judge Keenan was hindered in performing his judicial duties. This hindrance and derogation of Judge Keenan's authority is plain from the record and eventually forced Judge Keenan to withdraw from the case due to petitioner's contumacious acts. Under the facts and circumstances of this case, the Illinois Supreme Court found that petitioner was found guilty beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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